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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

National Fair Housing Alliance, Inc., et al.,)
) Case No. C07-3255 - SBA
Plaintiffs,)
) **PLAINTIFFS' OPPOSITION TO THE**
v.) **SPANOS DEFENDANTS' MOTION**
) **FOR RECONSIDERATION**
A.G. Spanos Construction, Inc.; et al.,)
)
Defendants.)

Hearing date: September 23, 2008
Time: 1:00 P.M.
Dept: Courtroom 3

Complaint Filed: June 20, 2007

I. INTRODUCTION

By Order of July 7, 2008 (Docket 123), this Court granted the Spanos Defendants' request to notice a motion for reconsideration of this Court's Order (Docket 98) denying their motions to dismiss. This Court further ordered that, pursuant to Local Rule 7-9(c), the motion for reconsideration be limited to the issue of whether the Ninth Circuit's opinion in *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008) (en banc) constitutes a change in the law such that this Court should reconsider that portion of its order denying the Spanos Defendants' motion to dismiss on statute of limitations grounds. As this Court

1 recognized, in denying Defendants' motions to dismiss, the repeated breaches of the law alleged by
 2 Plaintiffs constitute a continuing violation of the FHA that was ongoing at the time Plaintiffs filed their
 3 Complaint. This holding, as will be shown, remains unaltered by the subsequent decision of the Ninth
 4 Circuit in *Garcia*. Hence, this Court should not reconsider its holding that none of the claims of the
 5 Plaintiffs' First Amended Complaint (FAC) against the Spanos Defendants are barred by the statute of
 6 limitations. *National Fair Housing Alliance, et al. v. A.G. Spanos Construction, Inc. et al.*, 542 F. Supp.
 7 2d 1054 (N.D. Cal. 2008).

10 II. ARGUMENT

11 Defendants' only basis for reconsideration is its bald claim that, in deciding *Garcia*, the Ninth
 12 Circuit held the continuing violation doctrine, enunciated by the Supreme Court in *Havens Realty Corp.*
 13 *v. Coleman*, 455 U.S. 363, 380-81, 102 S. Ct. 1114, 71 L.Ed.2d 214 (1982), to be "inapplicable to [all]
 14 'design and construction' claims brought under 42 U.S.C. § 3604(f)(3)(C)." Memorandum In Support of
 15 Defendants' Motion for Reconsideration (Dkt. 126) at 2. This is wholly unsupported by a fair reading of
 16 *Garcia*.

18 In *Garcia*, the Ninth Circuit Court affirmed the validity of the continuing violation doctrine.
 19 Quoting *Havens*, the *Garcia* majority said: "'where a plaintiff, pursuant to the Fair Housing Act,
 20 challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues
 21 into the limitations period, that complaint is timely when it is filed within [the statutory period running
 22 from] the last asserted occurrence of that practice.'" (footnote omitted). *Garcia v. Brockway*, 526 F.3d
 23 456, 461-62 (9th Cir. 2008) (en banc). The *Garcia* majority went on to note that Congress subsequently
 24 codified the *Havens*' continuing violation doctrine by amending 42 U.S.C. § 3613(a)(1)(A) to include
 25 both "the occurrence [and] *the termination of* an alleged 'discriminatory practice' as events triggering the
 26 statute of limitations." (emphasis added). *Id.* at 462.

1 Unlike *Havens*, however, the practice in each of the *Garcia* cases was an isolated one—"the
2 failure to 'design and construct a multifamily dwelling according to FHA standards.'" (footnote omitted).
3 (emphasis added). *Id.* at 461. Therefore, the *Garcia* majority said, the statute of limitations was
4 triggered at the conclusion of the design and construction phase of the single multi-family dwelling
5 involved, which was the date the last certificate of occupancy was issued; and, since in each case before
6 the Court the triggering event happened more than two years prior to plaintiffs bringing their lawsuits,
7 both lawsuits were barred. *Id.* According to the Ninth Circuit, plaintiffs simply failed to plead facts
8 sufficient to warrant the application of *Havens'* continuing violation doctrine. 526 F.3d at 460-62.
9 Nowhere does the Ninth Circuit categorically reject its use where discrimination in the design and
10 construction of multiple apartment complexes under § 3604(f)(3)(C) has been alleged, as is claimed by
11 the Spanos Defendants.
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14 The practices pled by Plaintiffs here are exactly the type of conduct that the Ninth Circuit
15 recognized, in *Garcia*, as a legitimate continuing violation. Like *Havens* and unlike *Garcia*, the practices
16 pled by Plaintiffs are "'based not solely on isolated incidents ..., but a continuing violation manifested in a
17 number of incidents –including at least one that [was] asserted to have occurred within the [limitations]
18 period.'" 526 F.3d at 462 (footnote omitted). Plaintiffs' FAC alleges multiple violations of the FHA in
19 the design and construction of dwellings in approximately 82 apartment complexes including as many as
20 19 that were constructed within two years of the filing of this litigation. *See* FAC pp. 16-18. Thus, this
21 Court acknowledged that Plaintiffs' claim "challenges not just one incident of conduct violative of the
22 Act, but an unlawful practice that continues into the limitations period." 542 F.Supp.2d at 1061.
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25 The Spanos Defendants' request for reconsideration is no more than a rehash of a claim made in
26 their motions to dismiss that this is "really just a series of discrete, individual FHA violations and
27 therefore the statute of limitations begins to run at the completion of the construction of each complex."
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1 *Id.* This court correctly rejected that argument, held that *Havens* applied to the facts of this case, and
2 said that Defendants have offered no "intelligible argument why the reasoning of *Havens* is not applicable
3" *Id.* Even though Defendants may now rely upon *Garcia*, they still fail to provide an "intelligible
4 argument" why *Garcia* prevents *Havens* from applying here.
5

6 Defendants' only new reasoning comes from its citation to the Ninth Circuit's general concern for
7 designers and builders, who have sold off their inaccessible units, and who may have difficulty avoiding
8 liability in a private civil action by simply fixing the violation.¹ 526 F.3d at 461. Of course, this concern
9 is not relevant to those designers and builders who continue to have an ownership interest, as they may
10 avoid liability by bringing the units into compliance. Likewise, this concern is not relevant to those
11 designers and builders who, although no longer owners of the inaccessible units, sold the units to third
12 parties who are receptive to retrofitting their property.² Even those designers and builders who
13 encounter non-cooperating current owners do not indefinitely face exposure to liability in a private civil
14 action. When Congress amended the FHA in 1988 it rewrote § 3613(a)(1)(A) so that the limitations
15 period begins "after the occurrence *or the termination* of an alleged discriminatory housing practice"
16 (emphasis added). *See also* House Report No. 100-711, at 33, *reprinted* 1988 U.S.C.C.A.N. 2179, 2194
17 ("[T]he statute of limitations is measured from the date of the *last asserted occurrence of the unlawful*
18 *practice.*") (emphasis added). Thus, there is finality for these designers and builders two years after the
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¹ As the *Garcia*, Court notes, the FHA does not provide for a statute of limitations for civil actions brought by the Attorney General for equitable relief. 526 F.3d at 460.

² It simply does not follow that new owners will consistently resist making their property accessible to and usable by a wider population. As this court recognized, the remediation work can be timed as to minimize inconvenience to their renters, such as between tenancies. 542 F. Supp. 2d at 1067. Of course here the Spanos defendants are not required to repurchase inaccessible buildings in order to make the

1 3604(f)(3)(C). This is the same exposure to liability in a private civil action that is faced by those who
2 engage in other forms of housing discrimination, such as discrimination in the sale or rental of housing.
3 For all such repeat offenders, the statute of limitations is measured from the date of the last asserted
4 occurrence of the unlawful practice. In amending § 3613(a)(1)(A) to incorporate the continuing violation
5 doctrine, Congress clearly intended to hold such repeat violators liable for past transgressions until a
6 reasonable period had transpired after they ceased the unlawful practice. The FHA recognizes no
7 exception for discrimination in the design and construction of multifamily housing; and Defendants
8 continue to fail to provide an "intelligible argument" why this Court should take the extraordinary step of
9 fashioning an exception here.
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28 units accessible because the new owners have been joined as parties to allow this Court to order such relief as it deems appropriate. 542 F. Supp. 2d 1054.

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III. CONCLUSION

For the foregoing reasons, Defendants' motion for reconsideration should be denied. A proposed order is attached.

Dated: August 29, 2008

Respectfully submitted,

_____/s/ Michael Allen_____

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CERTIFICATE OF SERVICE

NORTHERN DISTRICT OF CALIFORNIA

I hereby certify that on August 29, 2008, a copy of the foregoing Plaintiffs' Opposition to the Spanos Defendants' Motion for Reconsideration was electronically filed and by operation of the Court's ECF system was served upon the following by electronic mail:

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